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## ISSUE BRIEF

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# The Art of the Possible: Environment in the Free Trade Area of the Americas

By John Audley

When they meet this November in Miami, Florida, the 34 trade ministers of the Western Hemisphere will do whatever they can to keep the Free Trade Area of the Americas (FTAA) negotiations from running aground. The lack of progress in key trade areas such as market access, agriculture, and investment, as well as competing trade negotiations involving other FTAA members, have turned the negotiation's scheduled 2004 completion date into a daunting finishline. Failure in Miami would leave trade ministers with two major setbacks on their hands, the first taking place when World Trade Organization negotiations broke down this past September, just a few hundred miles away in Cancun, Mexico.

Anticipating a troubling ministerial, last spring key FTAA governments began discussing whether or not they could increase their chances of a successful completion of the FTAA negotiations by reducing the number of subjects to negotiate. Among the subjects likely to be cut from negotiations is the environment.

Formally proposed by the United States early in the negotiations, its inclusion has been steadfastly rejected by Latin American countries; trade ministers argued in the 1997 Ministerial Declaration of Belo Horizonte that the relationship between trade and the environment will be considered after further developments by the WTO Committee on Trade and Environment. Since FTAA negotiations began in 1994, both the United States and Canada have negotiated environmental provisions into regional and bilateral trade agreements with some of the FTAA partners, including Chile and some of the Central American countries. Yet despite these examples of how environment can be incorporated into trade, Latin American countries like Mexico and Brazil will likely lead the charge to exorcise the environment from the FTAA negotiations for good.

While dropping environment may seem like a logical thing to do from a trade minister's perspective, its elimination would be a disaster for the negotiations. The majority of non-governmental organizations in the hemisphere already oppose the FTAA.

*John Audley is a senior associate at the Carnegie Endowment for International Peace, where he directs the Trade, Equity, and Development Project. Before joining the Endowment in April 2001, he was the trade policy coordinator at the U.S. Environmental Protection Agency, where he was responsible for developing and presenting EPA positions on U.S. trade policy.*

Therefore, removing environment from negotiations would undermine efforts by the undecided civil society groups to find a way to work with governments to produce an agreement they support. It is uncertain whether unanimous civil society opposition to the agreement would result in its failure; however, it is certain that the governments responsible for FTAA negotiation would lose an important opportunity to win back public support for a significant trade agreement. Support for trade liberalization is on very shaky ground, and governments can ill afford to negotiate another trade agreement that fails to take fully into account the interests of the affected public.

Is there a way for governments to negotiate meaningful commitments on the environment in the context of the FTAA negotiations? I believe there is, but success will require all parties to give up old prejudices and work together to take full advantage of the opportunity to secure long-term commitments from the United States, such as building the capacity of its hemispheric trading partners to protect the environment and public health. In exchange, developing country governments must be willing to set ambitious benchmarks for building that capacity. Finally, civil society organizations must be willing to accept the deal in exchange for new tools to help them hold their governments accountable for trade policy decisions. With less than 14 months to go in the negotiations, the parties must leave Miami with this commitment firmly in hand, in order to keep the FTAA timeline from faltering.

### **A Poison Pill?**

Before solutions to the trade and environment puzzle can be discussed, it is important to first understand the circumstances that created such a poisonous negotiating setting. Since negotiating the North American Free Trade Agreement (NAFTA) in 1994, U.S. government officials

have been pressured by non-governmental organizations (NGOs) to protect national regulatory authority from undue influence exerted by trade disciplines. In response to this pressure, U.S. negotiators have sought commitments from its trading partners to enforce their own environmental protection laws, just as they did in NAFTA's "parallel agreement" on the environment. The first major step towards making environmental regulatory commitment part of a trade deal took place when the United States and the Kingdom of Jordan agreed not to "fail to effectively enforce their environmental laws," and to continually "strive to improve environmental protection" as part of their 2000 bilateral trade agreement.

Noncompliance with this provision could lead to the use of trade measures to compel the other government to enforce its own environmental laws, although the chances of that occurring are extremely remote.

With the passage of the U.S.-Jordan Free Trade Agreement, the United States had found a political solution to the regulatory enforcement challenge posed by civil society. In essence, each party of a trade deal enforces its own environmental laws, or risks some kind of negative measure designed to encourage enforcement. The solution has now been codified in U.S. law; in the Trade Act of 2002 (*Trade Act*), Congress instructed U.S. negotiators to treat environment as a "principle" negotiating objective, ensuring that U.S. trading partners do not attract investment or encourage trade by relaxing national environmental laws. This led USTR Ambassador Robert Zoellick to negotiate trade deals with Chile and Singapore, including the environmental language proposed by the *Trade Act*. Although the documents remain classified, it is likely that the environment is also the subject of negotiation between the U.S. and the governments of Costa Rica, Honduras, Nicaragua, El Salvador, and Guatemala. The message from Congress to the administration is clear; bring home trade deals that include the environment, and make sure that U.S. trading partners do not

gain an unfair trade advantage through lax enforcement of its own environmental laws.

Also contained in the *Trade Act* are instructions from congress to build the capacity of U.S. trading partners to protect the environment and promote public health. In response to this instruction, over the past two years U.S. federal agencies have reorganized the way in which they present U.S. trade and environment policy, emphasizing that cooperation and capacity building should be guided jointly by the Department of State and USTR. While the changes have enabled developing country officials to learn to be better trade negotiators, improvements in U.S. efforts are still inadequate in providing trade-related environmental technical assistance and capacity building, as well as to improving the understanding of U.S. trade and environment policy objectives. For example, the United States Agency for International Development (USAID) has not made trade-related environmental technical assistance one of its trade priorities, nor has the United States used its influence to convince the Inter-American Development Bank to do the same. Furthermore, U.S. foreign service officers stationed in the capitals of key U.S. trade partners have no instructions to reach out to environmental ministries to help them benefit from the instructions found in the *Trade Act*.

The regulatory enforcement approach to the trade and environment challenge taken by the United States has been interpreted by its developing country trading partners as an effort to coerce them into enforcing their own environmental laws, or risk trade sanctions. Agreeing to what they see as new environmental conditions for access to the U.S. market taps into a deeply rooted fear among developing countries that the United States is using environmental laws to protect its markets from foreign competition. It also conjures up ghosts of earlier U.S. efforts to coerce Latin American governments to adopt U.S. policy priorities. This approach may be appropriate for

countries like Australia or Singapore, who already enjoy the capacity to develop and implement sound environmental laws. It may also be suitable for governments like Chile, Brazil, and perhaps even Mexico. However, this approach is poisonous for countries with little or no capacity to protect their environment, like those in Central America, the Caribbean, and many other parts of the hemisphere.

In response to this position, Latin American trade ministries have steadfastly rejected the inclusion of environment in the FTAA. Myopic trade negotiators have become stymied by language that emphasizes enforcement, entirely missing the opportunity to negotiate meaningful, binding commitments on the part of the United States to help them build their capacity to protect the environment. Since none of the Latin American governments directly involve their environment and development ministries in trade policy development, it is highly unlikely that trade ministers operating alone will ever see the benefits of bargaining for trade-related technical assistance and capacity building to protect the environment.

So now, the FTAA negotiations are faced with a difficult situation. U.S. negotiators must reach an agreement that includes the environment in a manner consistent with the *Trade Act*. Canada and Chile are the only two other countries in the hemisphere willing to discuss this subject in the FTAA.

Nevertheless, they are weak supporters of the U.S. approach. In their own trade negotiations they adopt a more cooperative approach to trade and the environment that relies on technical assistance and capacity building. This leaves U.S. and Canadian officials facing a wall of opposition from their Latin American counterparts on the environment, with only Chile willing to discuss the subject with other FTAA members. Led by Mexico and Brazil, trade ministries representing the rest of the FTAA countries—31 in total—want to see it purged for good.

## Solution

There is a way for all parties to agree to a common sense approach to addressing the environment in the FTAA. To be successful, each constituency group—civil society organizations and U.S. and Latin American governments—must be willing to move beyond worn-out phrases and positions. They must commit to work together to help build the capacity of Latin American governments to protect the environment and promote public health.

*As unpleasant as it sounds, Latin American governments must accept the political realities facing U.S. negotiators and, in the end, accept the U.S. proposal regarding regulatory enforcement.* Similar to the Chileans, they should insist that non-compliance with this commitment would lead to a financial penalty, rather than the use of trade measures. Furthermore, any fines paid should be directed to enhance environmental protection efforts. While difficult, it may be easier to accept this position if they look closely at the language proposed by the United States. The language contained in the second paragraph gives each signatory ample room to interpret it according to its own circumstances—and not enforce a law if circumstances make it impossible or impractical to do so. Ironically, U.S. regulatory agencies insisted that this language be included because they needed the flexibility to not enforce some regulations at any given time. A good case in point involves a public complaint against the United States under NAFTA's environmental side agreement for failing to enforce provisions of the Migratory Bird Treaty Act (MBTA). In response to a complaint submitted by the North American Commission for Environmental Cooperation under Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), the US claimed that due to limited resources, "targeting logging activities under the MBTA is not the most efficient, effective, or satisfactory means of protecting migratory birds."

*In exchange for accepting this language, Latin American governments should insist on a binding, long-term commitment from the United States to provide financial resources and technical assistance to build each country's capacity to protect the environment and promote public health.* Latin American negotiators should carefully read the language found in the *Trade Act*, which clearly states that U.S. negotiators must build the capacity of its trading partners to protect the environment and promote public health. In a speech he gave on September 17, 2003 to his fellow senators, and in a recent paper submitted to USTR, Senate Finance Committee (the committee responsible for overseeing all trade policy) co-chair Max Baucus (D-MT) indicated his support for providing this kind of assistance. There are also signs that the Bush administration would be willing to support such a proposal; since entering office, the Bush Administration has increased foreign aid to Latin America from \$1.65 billion in 2002 to \$1.9 billion in 2003.

Neither the U.S. Congress, nor any other parliamentary body, will make a commitment to a multi-year aid package without knowing how the money will be spent to achieve the policy goals. *To lock in U.S. and other country's support for this effort, developing countries must be willing to outline ten-year, national action plans designed to meet their most important environment and public health protection challenges.* For the most part, Latin American environmental ministries know the environment and public health challenges they face: improved access to clean water, more waste management facilities, better air quality, and a decrease in health problems associated with improper use of agricultural fertilizers and pesticides. In recent years Central American environmental ministries developed national action plans designed to meet these challenges over the next ten years. To ensure that the resources provided by donor countries like the United States are spent to meet the priorities of recipient countries, national action plans like those developed in Central America should become the basis for developing countries' commitments in

an exchange for long-term pledges from donor countries and organizations. *To measure progress, all countries must be willing to undergo regular, independent reviews by organizations like UNEP or the OAS, and make this information available to the public.* Donor countries should be expected to use this information to determine whether or not they would continue providing financial support.

For their part, *civil society organizations should accept this arrangement if they are given a meaningful role in the administration of the agreement itself. First, citizens should be guaranteed the right to complain to an independent body if they believe a government has not enforced its environmental laws as a means to attract business investment, or to give national companies a competitive advantage over foreign-owned businesses.* Legitimate complaints would trigger an investigation by this independent organization, leading to the publication of a fact-based report that describes the circumstances. Unlike NAFTA's environmental side agreement, a report would not necessarily create the potential for actions taken by individuals under the terms of the trade agreement, but would instead arm watchdog groups to use this information to embarrass governments, or take actions under national legal systems.

*Citizens must be able develop and implement their own solutions to community-based environment and public health problems.* One such model involves the Border Environmental Cooperation Commission and North American Development Bank (BECC/NADB). In this model, U.S.-Mexico border community members work with engineers and city planners to develop economically and environmentally viable environment and public health infrastructure proposals. Following public approval of these projects by the BECC, they work with the development bank and national governments to secure a combination of grants and low or no interest loans to pay for them. All projects must generate their own revenue, which is used to help repay part of the loans. As of June 30, 2003 the

BECC had certified a total of 83 projects with an estimated cost of \$2.2 billion to construct. Of these 83 projects, the NADB has approved 59 of them for a total of \$531 million in loans and grants, although only \$149.5 million of the total has been disbursed so far.

The approach outlined above does not pretend to address all of the environmental problems raised by civil society groups during the FTAA negotiations. Problems would still remain in key trade areas such as investment and services, and market access. Government officials throughout the hemisphere have not yet been convinced of the merits of the positions outlined by NGOs. Nor does this approach to trade and environment guarantee that the agreement will satisfy all development oriented objectives. While building sewage systems and waste water treatment plants would represent important steps towards meeting some development objectives, it may fall short of the market access guarantees that developing country manufacturers and farmers need to realize the benefits of a global economy. In short, addressing environment and trade challenges through technical assistance and capacity building may not be enough to win public support for the FTAA.

That said, trade negotiations create new opportunities for government officials to accomplish other important policy objectives. It would be advisable for Latin American governments to capitalize on the opportunities created by FTAA negotiations to build their capacity to protect the environment and promote public health. Meeting these challenges would represent an important step towards more effective governance throughout the region, and enable countries to point to concrete benefits to human health and the environment arising from trade liberalization. ■

**CARNEGIE ENDOWMENT FOR  
INTERNATIONAL PEACE**

1779 Massachusetts Avenue, NW

Washington, DC 20036

Phone 202-483-7600

Fax 202-483-1840

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